IN THE

Supreme Court of the United States

October Term, 1975

No. 75-994

WILLADENE LIVINGSTON,
Petitioner,

v.

FRED SHELTON,
Administrator, Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION AND MOTION FOR AWARD OF DAMAGES FOR DELAY

On Petition for Writ of Certiorari to the Supreme Court of the State of Washington

FRED SHELTON, Administrator,
Of Counsel
P.O. Box 333, 190 E. Main
Othello, Washington 99344

D. GORDON WILLHITE
Attorney for Respondent
1900 Peoples National Bank Building
Seattle, Washington 98171

CRAFTSMAN & MET PRESS SEATTLE, WASHINGTON

SUBJECT INDEX

TABLES OF AUTHORITY

Table of Cases

Constitutional Provisions

Statutes

Textbooks

Other Authority

IN THE

Supreme Court of the United States

October Term, 1975
No. 75-994

WILLADENE LIVINGSTON,
Petitioner,

v.

FRED SHELTON,
Administrator, Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION AND MOTION FOR AWARD OF DAMAGES FOR DELAY

On Petition for Writ of Certiorari to the Supreme Court of the State of Washington

---

COMES NOW Fred Shelton, Administrator de bonis non with Will annexed of the Estate of Elwyn Judson Livingston, Deceased, and opposes the Petition for Writ of Certiorari in the above-entitled cause, received on the 13th day of January, 1976, and moves the Court for an Order awarding damages to the Respondent upon the ground that this Petition was sued out merely for delay in the probate of the Estate of Elwyn Judson Livingston, Deceased.

FORMAT

For convenient reference, Respondent will use the format of the Petition, but will correct any inaccuracies or omissions found in the Petition.

OPINIONS BELOW

In addition to the lower court Decisions cited and set forth in the Appendix of the Petition, the Respondent has added the Judgment of the trial court dated the 26th day of December, 1972, and set forth as Appendix J.

JURISDICTION

There is no title, right, privilege or immunity, or any other claim under the U.S. Constitution, or for that matter, the State Constitution, affected by the judgment herein affirmed by the Washington State Supreme Court. None was raised during three levels of state courts, except on the final petition for rehearing, raising a State Constitution question, no federal one, which was promptly rejected without opinion. This is a common law suit in subrogation. A state insurance statute was argued but found not applicable. There is no federal question here to confer jurisdiction on the U.S. Supreme Court. See argument below.

STATUTE INVOLVED

Petitioner attempts to stretch the provisions of 28 USC, Section 1257 (3) to reach a "title, right, privilege or immunity . . . claimed under the Constitution" to acquire jurisdiction of the United States Supreme Court, but has failed to do so in her Petition. Petitioner sought to be subrogated to a bank claim for money only, under the common law doctrine of subrogation, but was unable to qualify. Petitioner enjoyed "due process" through three

levels of the State courts and raised no Constitutional question until after the final decision of the State Supreme Court. It was rejected there, on rehearing, without opinion and has no substance or merit here. Petitioner has pointed out no "life, liberty," or any specific "property" (except a hypothetical claim for money) that she has been deprived of without "due process of law"—in three years of litigation. See argument below.

QUESTIONS PRESENTED

Respondent rejects Petitioner's "Questions Presented" Nos. 1 and 2 as being inaccurate statements of the questions of law presented in the case appealed from.

> "The failure of the Petitioner to present, with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration, will be a sufficient reason for denying her Petition." 32 Am. Jur. 2d 752, Section 286, Rule 23(4) Rules of Supreme Court.

Respondent herewith restates the true issue found in this case:

1. (in Petition) — Not appropriate.

2. (in Petition) — Not appropriate.

3. Does the denial of an unmeritorious claim under the common law doctrine of "subrogation," for a sum of money only, constitute an abridgment of "any title, right, privilege, or immunity . . . specifically set up or claimed under the Constitution," Amendment XIV of the United States Constitution providing ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws," or Article XIX of the Constitution of the State of Washington, providing "the legislature shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families?"

Petitioner sets forth in her Petition no such title, right, privilege, immunity, or any specific property or homestead that she has been deprived of with or without due process of law. She is a disappointed litigant for a claim of money under a mythical claim of "subrogation." Her petition sets forth no persuasive legal grounds, and appears to be filed for the purpose of delaying the probate and settlement of her deceased husband's estate. See Argument below.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions cited in the Petition are not applicable to this case, nor appropriate, as discussed below. Petitioner cites no language of the constitutional sections upon which she is relying.

STATEMENT OF THE CASE

For convenient reference, Respondent will use the eight definitions and symbol references found on page 4 of the Petition, for identification of the Court, the parties, and portions of the record.

A Concise Restatement of the Case

Petitioner's recital of the facts is so truncated, nebulous, and inaccurate, that her theories and thesis, and her brief as a whole, are rendered unintelligible. This alone is grounds for denying Petition. Rule 23(4), Rules of Supreme Court.

The true facts are these:

Petitioner and her husband, the late Elwyn Judson Livingston, Deceased, herein referred to as decedent, were a marital community under the the community property laws of the State of Washington, and carried on farming operations, and other related business enterprises through family corporations, in and near Othello, Washington, until the death of the decedent in December of 1968, from injuries received in an auto accident. To finance their enterprises, the decedent and the Petitioner obtained extensive loans from the Bank of Yakima, which required and took, as collateral, mortgages on all of the real propery of the borrowers, including assignment of accounts receivable, a general loan and collateral agreement, and an assignment of four life insurance policies on the life of the decedent with face values of approximately $425,000.00. The decedent had life insurance of a face value in excess of $800,000.00 on his life at the time of his death, and all of it was taken in the name of, or transferred to the name of, the Petitioner as owner, during decedent's lifetime, and the Petitioner was named as beneficiary. Petitioner joined with her husband, individually and as a marital community, in assigning to the Bank of Yakima approximately $425,000.00 of said life insurance, as collateral to secure said loans, which were granted to the decedent and his wife, individually and as a marital community. The general loan and collateral agreement provided that the Bank, at its option, could apply, in any order, any of the collateral in payment of its debt, including the proceeds of the life insurance, in the event of death. Upon the death, the life insurance companies remitted the insurance proceeds to the Bank as assignee of record in the sum of $453,516.77, in exchange for the original policies held by the Bank. The balance owing to the Bank at death was $623,887.46. The insurance companies paid directly to the Petitioner approximately $400,000.00 of the proceeds of policies that were not assigned to the Bank and which sum came into the Peti-

tioner's hands, outside of the probate, and free of any creditor claims. Said funds paid to the Petitioner were not inventoried in the estate, and are not at issue in this case. At the time of death, the estate was bordering on insolvency. The Petitioner was appointed executrix under the terms of the decedent's Will, qualified, and acted as executrix for approximately two years, until she was removed for mismanagement of the estate. *In re Estate of Livingston*, 7 Wn. App. 841, 502 P.2d 1247 (1972). Respondent, a local lawyer, was appointed administrator to settle and distribute the estate. Creditors of the decedent and Petitioner filed allowable claims in a sum of approximately $400,000.00, which remain unpaid. When Administrator attempted to obtain a court order for the sale of the real property of the estate, including the decedent's family dwelling, Petitioner commenced this action in subrogation. The balance of the debt to the Bank of Yakima, after the application of insurance proceeds and other property, was paid in full by the Administrator, with the written approval of Petitioner's counsel, and the Bank released all of its collateral and mortgages.

By subrogation, the Petitioner seeks to be placed in the shoes of the Bank of Yakima as holder of its mortgages on all of the estate property to the extent of the assigned insurance proceeds paid in the sum of $453,516.77, thereby, in effect, sequestering to herself all of the remaining assets of the estate, and leaving the creditors with no payment at all. The Petitioner is the residual heir of the decedent.

The trial court, a visiting judge, dismissed Petitioner's suit in subrogation, summarily at the close of her case, without hearing the Respondent, and stated that this case

was simple, it was not a subrogation case at all. See Appendix A.

The Court of Appeals, finding no applicable Washington decisional law, erroneously applied, from other non-community property states, a common law rule that permitted widow-beneficiaries, in certain instances, to be subrogated to the liens of assignee-bank-creditors of decedents. The Court of Appeals, in overlooking the assignment, also misconstrued Revised Code of Washington 48.18.410, pertaining to exemption of life insurance proceeds, and reversed the trial court, found that the Petitioner had made a prima facie case for resumption of the trial.

Because of such grievous errors, Respondent, rather than resuming the trial, appealed promptly to the Supreme Court of the State of Washington, which, in a 9 to 0 decision, reversed the Court of Appeals and confirmed the judgment of the trial court, dismissing Petitioner's suit in subrogation. Petitioner's motion to stay proceedings was denied by the Washington State Supreme Court, as noted in the Petition for Writ of Certiorari, page 6.

FEDERAL QUESTIONS RAISED

1. Petitioner, in three levels of the state court, sought to buttress her claim in subrogation by a misinterpretation of RCW 48.18.410. The Washington State Supreme Court properly disregarded said statute because it is not applicable to the facts in this case.

2. For the first time, (page 7.2. of Petition), in her Petition for Rehearing before the Washington Supreme Court, Petitioner attempted to establish a federal question by tying the insurance exemption statute to Article XIX of the

Washington State Constitution, which provides as follows,

> "The legislature shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families."

Insurance exemption in Washington is provided by special statute and does not fall under the homestead exemption provided for by the State Constitution, or pursuant thereto.

> "Thus, mattters other than the question of federal jurisdiction or evidence contained in the record will not ordinarily be considered by that court on appeal where they were not presented and decided in the lower court. Similarly, the Supreme Court, on certiorari, will not, as a rule, consider claims not made below, or not timely made, particularly where the questions not raised below is important. 32 Am. Jur. 2d 766, Section 297.
>
> "As previously indicated, it is essential to jurisdiction of the Supreme Court on appeal from a state statute that there be an explicit and timely insistence in the state court that the statute, as applied, is repugnant to the federal Constitution, treaties, or laws. Thus, the Supreme Court on an appeal will not pass upon the question of the constitutionality of a state statute which was not raised in the proceedings in the state courts." 32 Am. Jur. 2d 768, Section 297.
>
> "A preliminary step in showing that the state court's decision turned on a federal question, and one which the Supreme Court has uniformly recognized as essential, is that the record shows such a question actually arose or was presented in the case. A second essential step in showing that the state court's decision turned upon a federal question is to show from the records that the state actually passed upon and decided a question of this character. It must also appear from the record, affirmatively or by fair implication, that the decision was necessary to determination of the cause." 32 Am. Jur. 2d 777, Section 303.

3. Petitioner has cited no federal question that would apply to her facts; she has cited no constitutional right that has been abridged, and she pressed none during trial or appeals, and, therefore, Petitioner has not attained jurisdiction of this Court under 28 USC 1257(3) or under Rule 19 of the U.S. Supreme Court.

> "Consequently, the Court will not review a judgment or decree of a state court if the record shows it was, or may have been, rendered upon a ground which did not involve a federal question and which was sufficient to sustain it." 32 Am. Jur. 2d 777, Section 303.

4. Petitioner sought relief under a common law doctrine in equity; her complaint was patiently heard and adjudicated in three levels of the state court; no constitutional rights were asserted or interfered with; Petitioner has qualified for no right to writ of certiorari, any more than any other disgruntled litigant seeking a sum of money under equitable common law principles.

5. Petitioner has not been deprived of life, liberty, or property, without due process of law, nor has she been denied equal protection under the laws, as intended by Amendment XIV of the United States Constitution, nor has she demonstrated otherwise, in her petition. She simply lost a suit in a common law claim for money.

> "As already indicated, the Rules of the Supreme Court provide that where a review of the judgment of a state court is sought, the required jurisdictional appeal, or the petition for certiorari, as the case may be, must specify the state at which and the manner in which the federal questions sought to be reviewed were raised in the courts below, the method of raising them, and the way in which they were passed upon by the court. In addition, the jurisdictional statement must contain such pertinent quotations from the

record as will support the assertion that rulings of the state court were of a nature to bring the case within the statutory provisions believed to convert jurisdiction on the Supreme Court, and must include a presentation of the grounds upon which it is contended that federal questions are substantial, which must show that the nature of the case and of the rulings of the state court was such as to bring the case within the jurisdictional provisions relied on and the cases cited to sustain the jurisdiction. The petition for certiorari must also contain such pertinent quotations from the record as will show that the federal question was timely and properly raised so as to give the Supreme Court jurisdiction to review the judgment on Writ of Certioari." 32 Am. Jur. 2d 277, Section 303.

These things Petitioner has not done.

REASONS FOR NOT GRANTING THE WRIT

As can be seen from the records and files herein, the Petition for Writ, itself, and by the appendices thereto, the Petitioner attempted to sequester to herself the remaining assets of her husband's estate under the theory of subrogation and thereby leave the creditors of herself and her deceased husband, with claims of approximately $400,000.00, with no payment at all. No place in her case in three levels of the State courts did she press, or argue, the "equities" of her position, because clearly she had none. Equity is the foundation of subrogation. Petitioner had no equity to support her position; in fact, her equities were negative—against herself and her actions could more simply be characterized as "piracy" or self-enrichment. The theory of her subrogation claim finds some decisional support in a series of cases from common law states, where a wife at common law held no title or interest in her husband's property and thereby qualified as a true

third party-subrogee between creditor and debtor husband, required for common law subrogation. Appendix A. None of those cases present the shocking and unconscionable posture of the claim of the "subrogee" in this case.

Lacking the equities, and attempting to establish "third-party" status, Petitioner has adroitly and ingeniously turned to RCW 48.18.410, which expressly provides exemption for proceeds of life insurance, in the hands of the beneficiary. Petitioner blindly misconstrues the plain language of this statute.

The first line of said statute commences:

> "The lawful *beneficiary, assignee, or payee* of a life insurance policy . . . shall be entitled to the proceeds and avails of the policy against the creditors and representatives of the insured . . . existing at the time the proceeds or *avails are made available for his own use.*" Appendix G. (Emphasis ours)

Clearly, this exemption, after an assignment, extends only to the assignee—the Bank of Yakima—and not the beneficiary—Petitioner. Both cannot enjoy the exemption at the same time and the statute reads, in the alternative, "or." Furthermore, the "proceeds or avails" were never "made available for (her) own use." They were rightfully paid to assignee, who enjoyed said statutory exemption.

Petitioner had effectively and irrevocably assigned, as collateral, all of her rights in said insurance proceeds, individually and as a member of the marital community, in writing, to the Bank of Yakima, in exchange for the grant of loan or loans of money to her and her husband in excess of $600,000.00. Death intervened, and the assignment became absolute, and the insurance was applied as intended

and as agreed. Such insurance proceeds never accrued to her, individually, as a third-party, to qualify her as a subrogee. The Washington State Supreme Court correctly ignored this specious argument and naive misinterpretation of the statute by the Petitioner.

The Washington State Supreme Court has held that even a homestead is not protected by Article XIX of the Washington State Constitution, as Petitioner contends, where the homestead has been voluntarily alienated or encumbered. *Oregon Mtg. Co. v. Hersner,* (1896) 14 Wash. 515, 45 P. 40. How much more so is the conclusiveness of an assigned right that does not enjoy the protection of the Constitution?

Thus, Petitioner, first, has no equitable right and, secondly, has effectively and irrevocably assigned her exemption rights, if any, for a valuable consideration, in the insurance proceeds. She cannot have her cake and eat it, too.

Petitioner has presented no clear and convincing federal question or constitutional question that would give her access to this Court, and her petition should be denied.

> "(In the Petition for Writ of Certiorari) there must be averments so distinct and positive as to place it beyond question that the party bringing the case up for review intended to assert a federal right." 32 Am. Jur. 2d 778-779, Section 304.
>
> "Generally, the federal question must be raised before final decision in the state court and it may be too late where it is presented in an application for rehearing in the highest state court (footnote 10) unless that court entertains the application and proceeds to pass upon the federal question (footnote 11) or exerted its jurisdiction . . . or unless the question respecting the validity if the statute . . ." 32 Am. Jur. 2d 732, Section 261.

These things Petitioner has not done.

RESPONDENT'S ANSWERS TO PETITIONER'S REASONS FOR GRANTING THE WRIT

In her argument, under Reasons for Granting the Writ, Petitioner solemnly intones the Constitution of the State of Washington, in commencing her argument on this insurance exemption statute, but is careful not to recite that the insurance exemption statute was enacted pursuant to any provision of said Constitution.

Petitioner relies heavily on *In re Northern Sav. & Loan Ass'n. v. Kneisley,* 193 Wash. 372, 76 P.2d 297, and proceeds to cite the old insurance exemption statute that has been amended at least three times. Then *Holden v. Stratton,* 198 U.S. 202, 49 L. Ed. 1018, 25 S. Ct. 656, is mentioned; and then she states: "There has been no change in effect in the wording of the Washington life insurance exemption statute since the date of *Holden v. Stratton, supra.*" Then, to immediately contradict herself, the next paragraph sets forth the present wording of the statute, which is substantially different than at the time of the cited cases. This is misleading.

These cases do not support her hypothesis.

Then, the Petitioner, with the language of the statute before her, naively and inexplicably, makes the inaccurate bold statement that "the beneficiary, as petitioner herein, is entitled to the proceeds of the life insurance against the 'creditors and representatives of the insured'." The statute says that the beneficiary (or) *assignee* shall be entitled to the proceeds. Petitioner had assigned them and

given them up, including the exemption. Her argument is meaningless and transparent.

Starting with this grossly false interpretation of the statute, the Petitioner proceeds to vainly squander meaningless verbiage, completely off the point.

On page 12 of the petition, *1 Barren and Holtzoff* is cited to the effect that final judgment of a state court of last resort may be reviewed by the Supreme Court by certiorari if any right, title, or privilege is claimed under the Constitution of the United States, and states further "The Supreme Court will not review a state court decision, even though a federal question is involved, if the decision rests on adequate state ground," and then continues that the Supreme Court will determine whether the state ground is adequate. Petitioner makes a common law claim, which was adjudicated justly, and the State adequately interpreted its own State statute.

Here, Petitioner has no constitutional ground, or even a federal question, to even knock on the door of this august tribunal.

Petitioner again presses, on page 12, that she was denied a statutory exemption right, deprived of a state constitutional property right, and then she complains that the court or the administrator has cited no case to disprove her theory. Her theory is so groundless that no disproof is indicated or necessary, and need not be dignified.

Next, on page 13, Petitioner cites obiter dicta from *Broad River Power Co.* and *Demorest*, both U.S. Supreme Court cases, that actually hold against her position, and both dismiss the Petition for Writ of Certiorari. The rule cited does not support her.

On page 14, Petitioner argues that the Court in *Livingston* "worked an unpredictable change in the state law." The Court of Appeals said, which constitutes a refutation of this statement, that *Livingston* was a case of first impression in Washington. Thus, she could not have been misled by an unpredictable change.

Petitioner attempts to stretch the holding in *In re Schoenfeld Estate*, on page 15 of her brief, to cover her situation. The case is not apposite. No assignment of the policy was involved.

Petitioner attempts to show discrimination by citing the *Kneisley* and *In re Elliott* cases, on page 17 of her brief, (books and pages are cited on pages 8 and 9). There is no similarity with the *Livingston* case, because neither involve assignment of life insurance.

It is significant that *In re Elliott* cites *Erie R. R. v. Tompkins*, 304 U.S. 64, 8 L. Ed. 1188, 58 S. Ct. 817, 114 A.L.R. 1487 (1938). The case states:

> "Since *Erie* federal courts have been required to follow local law as expounded by state courts."

How appropriate.

A state court's construction of a state statute is binding on federal courts. *Standard Oil Co. v. New Jersey*, 341, U.S. 428, 95 L. Ed. 1078, 71 S. Ct. 822 (escheat statute).

The *Livingston* case involves local law and interpretation of local statutes. Federal courts do not interfere. Inasmuch as the Petitioner can find no federal or constitutional question, she is not entitled to a Writ of Certiorari.

> "Review by the Supreme Court on certiorari does not encompass local matters and questions of state

law, the decision of which does not involve any violation of the Federal Constitution or State laws." (Footnote 11, 32 Am. Jur., *Fed. Practice*, p. 763.)

Petitioner blindly ignores her own factual situation and curiously interprets the insurance exemption statute and plunges forward in a vague and rambling argument that is so irrelevant and illusive in places that it is difficult to grapple with. The petition is an opus of obfuscation. Her only glimmer of hope, in her seemingly endless litigation, was found momentarily in the Court of Appeals. That Court found no Washington case precedent, and, groping for some law, latched onto the inappropriate common law states' rule of subrogation, and then became decoyed into the Petitioner's insurance exemption theory. The Washington State Supreme Court quickly straightened out that aberation.

Notwithstanding her ingenious theory, Petitioner is unable to cite any reasonable grounds under a federal or constitutional question to qualify for the jurisdiction of the Supreme Court.

FURTHER LAW AND ARGUMENT

For jurisdiction, Petitioner relied upon Article XIX of the State Constitution of Washington, which provides as follows:

> "The legislature shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families."

Yet, her argument is not based on this constitutional Article at all, but on an insurance statute, which was not passed pursuant to homestead exemptions. The insurance statute benefits beneficiaries of all classes not limited to "heads of families."

The jurisdictional federal statute, 28 USC, Section 1257 (3), pertains to the Federal Constitution and not state constitutions.

The U.S. Supreme Court has said:

> "The construction of state constitutions and statutes is a matter for the state courts." *King v. West Virginia,* (W. Va. 1910) 216 U.S. 92, 30 S. Ct. 225, 54 L. Ed. 396.

Petitioner next relies upon the "due process" clause of Amendment XIV of the U.S. Constitution.

Black's Law Dictionary defines due process of law, thusly:

> "Law in its regular course of administration through courts of justice."

Petitioner's rights have been adjudicated through three levels of courts of record of the State of Washington.

Due proces of law has also been defined as follows:

> "Due process of law means a course of legal proceedings, according to those rules and principles which have been established in our system of jurisprudence, for the protection and enforcement of private and personal rights." *Ex parte Stricker* (C.C. Ky. 1901), 109 F. 145.

The Supreme Court has stated further on this:

> "To constitute a violation of this clause, it should appear that such person has a property in a particular thing of which he is alleged to have been deprived." *New Orleans v. New Orleans Water Works,* (La. 1891) 142 U.S. 88, 12 S. Ct. 142, 35 L. Ed. 943.

Petitioner has pointed to no property of which she has been deprived. Her claim is a subrogation for money under the Bank mortgages.

The Supreme Court has stated further:

> "Law, in its regular course of administration through courts of justice, is due process, when secured by the law of the state, the constitutional requisite is satisfied." *Caldwell v. Texas,* (Tex. 1891), 137 U.S. 697, 11 S. Ct. 224, 34 L. Ed. 816.

On Petitioner's failure to raise a federal question in the State courts, the Supreme Court has said:

> "This court has always held it is a prerequisite to the federal question in a case coming from a state court that the question should have been raised in that court before decision, or that it should have been actually entertained and considered upon petition to rehear. A mere denial of the petition by the state court, without opinion, is not enough." *Tidal Oil v. Flanagan,* 263 U.S. 444, 68 L. Ed. 382, 387.

Petitioner failed to raise a constitutional question until she filed Petition for Rehearing, which was denied without opinion. Thus, she cannot reach this court.

That opinion further stated a refutation to one of Petitioner's points, as follows:

> ". . . the mere fact that the state reversed a former decision, to the prejudice of one party, does not take away his property without due process of law." *Tidal Oil Co. v. Flanagan, supra.*

On jurisdiction, the Supreme Court stated:

> ". . . it must affirmatively appear that the federal question was decided and that its decision was essential to the disposition of the case; and that where it is not clear whether the judgment rests on a federal ground or an adequate state one, this court will not review." *Herb v. Pitcarin,* 324 U.S. 117, 65 S. Ct. 459, 89 L. Ed. 789, 795.

That decision held further:

> "It is our purpose scrupulously to observe the long

> standing rule that we will not review a judgment of a state court that rests on an adequate and independent ground in state law." *Herb v. Pitcarin, supra.*

Further, on jurisdiction:

> "To give the Supreme Court jurisdiction of error to state court, mere assertion of a claim in respect of some constitutional right is not enough, but there must be a real and substantial controversy of the required character which deserves serious attention." *U. S. Fid. & Guar. Co. v. State of Oklahoma,* (1919) 250 U.S. 111, 39 S. Ct. 399, 63 L. Ed. 876.

The Supreme Court states further:

> "The court has no jurisdiction, unless a real, and not a fictitious, federal question is involved." *Millinger v. Hartupee,* (Pa. 1868) 73 U.S. 258, 18 L. Ed. 829.

On construction of States statutes, the Court states as follows:

> "United States Supreme Court must accept state court's construction of a state statute." *Cramp v. Board of Public Instruction,* (Fla. 1961) 368 U.S. 278, 82 S. Ct. 275, 7 L. Ed. 2d 285.
>
> "State courts have final authority to interpret and, where they see fit, to re-interpret that state's legislation." *Garner v. State of La.,* (La. 1961), 368 U.S. 157, 82 S. Ct. 248, 7 L. Ed. 2d 207.
>
> "The construction of state law is the exclusive responsibility of state courts." *Speiser v. Randall,* (Cal. 1958), 357 U.S. 513, 78 S. Ct. 1332, 2 L. Ed. 2d 1460.

The Court says that the federal question must be substantial:

> "To afford the basis for review, either by appeal or certiorari, the federal question upon which the state court judgment hinges must be substantial." *Zucht v. King,* (1922) 260 U.S. 174, 43 S. Ct. 24, 62 L. Ed. 194.

Thus it has been demonstrated that the Petitioner has

failed to present a constitutional or federal question to reach the Supreme Court, that her theory is artificial and fictitious, that she enjoyed patient and extensive due process through the state courts, and her petition is without foundation and should be denied.

MOTION FOR AWARD OF DAMAGES FOR DELAY

Respondent hereby moves the Supreme Court of the United States for an Order awarding damages to Respondent for the delay of the probate of the Livingston Estate, caused by Petitioner's Petition for Writ of Certiorari, pursuant to Rule 56(2)(4), Rules of the U.S. Supreme Court.

This Motion is based on the Affidavit of the Respondent annexed hereto as Appendix B, in the sum of $22,050.94, and on the grounds that Petitioner's Petition is patently dilatory and spurious, without supportive legal foundation.

The Livingston Estate has been in probate for seven years and the Respondent has been in litigation nearly five years, involving the Petitioner.

Petitioner is frustrating the orderly administration of this estate with frivolous and groundless litigation, which is dissipating the estate with legal and court costs and permitting the assets of the estate to be dissipated in accruing interest and administrative expense.

CONCLUSION

Petitioner prays the Court to deny the Petitioner's Petition for Writ of Certiorari and award the Respondent damages suffered by the estate for the needless expense and cost accumulating by delay caused by the groundless

and frivolous petition filed by the Petitioner, in the sum of $22,050.94, as detailed in Respondent's Affidavit.

Dated this 6th day of February, 1976.

Respectfully submitted,

D. GORDON WILLHITE
Attorney for Respondent

FRED SHELTON, Administrator
Of Counsel

APPENDIX A

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF ADAMS

(Sitting for this cause,
In the Lincoln County Courthouse, Davenport)

WILLADENE LIVINGSTON, a widow, *Plaintiff*, v. FRED SHELTON, as Administrator of the Estate of Elwyn Judson Livingstone, Deceased; THE BANK OF YAKIMA, a State Bank, *Defendants.*	No. 11185 JUDGMENT

THIS MATTER having come on regularly before the Court for trial without jury on the 20th day of November, 1972, sitting as a visiting judge, in the Lincoln County Courthouse, Davenport, Washington, Willadene Livingston, Plaintiff, appearing in person and being represented by W. Walters Miller and Richard Miller, her attorneys, Fred Shelton, as Administrator de bonis non with the Will annexed of the estate of Elwyn Judson Livingsston, deceased, appearing in person and representing himself, as said Administrator, and Willadene Livingston testifying and adducing evidence in support of her Complaint, the Bank of Yakima, as Defendant, not appearing, and not having been served with process, and the attorneys for Plaintiff and Fred Shelton, as Administrator, having stipulated that true copies of promissory notes executed by E. J. Livingston and Willadene Livingston, his wife, payable to the Bank of Yakima, evidencing a debt by them due to the Bank of Yakima, with a balance owing of $623,887.46, as of December 11, 1968, and the mortgages given as security thereon, together with assignments of

other collateral, be admitted in evidence, and having further stipulated that copies of Deeds by which the Livingstons took title to Farm Units 137, 138 and 139, Irrigation Block, 45, Columbia Basin Project, Adams County, Washington, be admitted in evidence, and it being further stipulated that copies or memoranda in evidence of copies of the following described insurance policies, insuring the life of E. J. Livingston, deceased, and copies of the assignments thereof, and the general collateral agreement given to the Bank of Yakima, be admitted in evidence, to-wit: Central Life Insurance Company, Policy No. 964997, dated February 25, 1963; Safeco Life Insurance Company, Policy No. 51855, dated March 10, 1965; and United Pacific Life Insurance Company, Policy No. 5765, dated June 17, 1965; and at the conclusion of Plaintiff's case, Plaintiff having rested; and before the commencement of the Defendant Administrator's case, the Court on its own initiative announced that Plaintiff has no claim in subrogation and that her Complaint would be dismissed; and the Defendant did not further press his defense or his counterclaims, and produced no evidence in support thereof; and the court having examined the evidence, and having read and examined the trial briefs submitted by the parties; and the court having heard the argument of Plaintiff's counsel on the theory of subrogation and having rejected Plaintiff's theory, and the Court being duly advised in the premises, and the Court having heretofore entered its Findings of Fact and Conclusions of Law, now, therefore,

IT IS ORDERED, ADJUDGED and DECREED that Plaintiff's Complaint be dismissed with prejudice.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that all of the real and personal property inventoried in the Estate of Elwyn Judson Livingston, Deceased, in probate cause no. 4074, In the Superior Court

of the State of Washington, for Adams County, be, and the same is hereby cleared and quieted in the Administrator of said estate, free of any cloud or encumbrance or restriction, imposed thereon by Plaintiff, by reason of, or arising out of Plaintiff's claim of subrogation, alleged in the above entitled cause, or by reason of any Lis Pendens filed or recorded on the public records, by reason of the above-entitled action or claim of subrogation alleged thereon; and the Adams County Auditor is hereby authorized and directed to release of record any Lis Pendens bearing the caption of the above-entitled cause.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that Defendant Administator's counterclaim for attorney fees incurred in defending the above-entitled action and his counterclaim for damages for filing Lis Pendens and actions in frustrating orders of the probate court, be, and the same are hereby dismissed, without prejudice.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the Defendant Administrator is entitled to, on behalf of the estate, his costs herein.

Dated this 26 day of December, 1972.

/s/RICHARD J. ENNIS
Judge

Presented by:
/s/FRED SHELTON
FRED SHELTON, as Administrator
of Estate of E. J. Livingston
Deceased.

APPENDIX B

AFFIDAVITS IN SUPPORT OF MOTION FOR AWARD OF DAMAGES FOR DELAY CAUSED BY PETITION FOR WRIT OF CERTIORARI

STATE OF WASHINGTON }
County of Adams } ss.

FRED SHELTON, being first duly sworn on oath, deposes and says:

That he is the duly appointed and acting Administrator de bonis non with Will annexed of the Estate of Elwyn Judson Livingston, Deceased, in the Superior Court of the State of Washington, in and for the County of Adams, Probate Division, Probate No. 4074.

That he was appointed as Administrator by the Court in January, 1971, and has been at all times since and is now the acting Administrator of said estate.

That Administrator has been trying diligently to wind up the affairs and settle said probate, pay the creditors, and distribute the assets, but has been continually frustrated from doing so by the litigation of the widow of the decedent, the Petitioner.

That it appears to Respondent that the Petition for Writ of Certiorari in the above-entitled Court is sued out for the purpose of further delay.

That said Petitioner has litigated a groundless claim in subrogation against the Administrator for over three years in three levels of the state courts and her claim was conclusively rejected by the court of last resort.

That Petitioner has filed a groundless Petition for Writ of Certiorari in the above-entitled court which will delay the probate proceedings and the settlement of the estate for at least another year.

That certain claims listed below have been reduced to judgment and are bearing interest at an annual rate as shown on Exhibit "A" annexed hereto and by this reference made a part hereof, which constitutes a dissipation of estate funds, and an unfair discrimination against other unsecured general creditors, whose claims have been approved and whose claims do not bear interest.

That the delay of each year that elapses pending the disposition of Petitioner"s Petition for Writ of Certiorari will result in a loss to the estate of the sum of approximately $19,050.94 in interest and the sum of $3,000.00 in court costs, attroney fees, and costs of administration as listed below:

Judgment Creditor	*Annual Accrued Interest*
(See Exhibit "A" next page)	
Total	$19,050.94

Unnecessary Costs of Administration in Delay of Estate

Attorney fees, response to Petition for Writ of Review (estimated)	$2,000.00
Estimated costs of travel, telephone, etc., if necessary to attend oral argument	500.00
Estimated extra accounting and bookkeeping	500.00

That the disposition of Petitioner's Petition for Writ of Certiorari to this Court will delay said probate at least a year.

/s/ FRED SHELTON

SUBSCRIBED and SWORN TO before me this 28th day of January, 1976.

/s/ PAUL E. HART
Notary Public in and for the State of Washington residing at Othello. [seal]

Exhibit "A," Appendix B

Name of Creditors	*Amount of Judgment*	*Rate of Interest*	*Monthly Interest*	*Annual Interest*
Columbia Industries	$ 19,314.33	6%	$ 96.57	$ 1,158.86
Shell Chemical Co.				
(Principal)	$193,419.06	7½%	$1,208.87	$14,506.43
(Accrued Interest)	43,519.17			
(Attorney Fees)	10,000.00			
(Atty. Costs Adv.)	487.90			
Caw and Caw	$ 9,875.00	8%	$ 65.83	$ 790.00
Paul F. Bonnell	$ 1,646.40	6%	$ 8.23	$ 98.78
F.M.C. Corporation	$ 31,210.83	8%	$ 208.07	$ 2,496.87
(This is not a judgment but a note and other papers noting interest)			Total Annual Interest	$19,050.94